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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 417

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, W. H. HOOPES and NICK MILOSEVICH,

Petitioners,

vs.

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw Marsha Ann,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

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IN THE

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No. .....

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, W. H. HOOPES and NICK MILOSEVICH,

Petitioners,

vs.

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw Marsha Ann,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The petition of Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski, William T. Decker, W. H. Hoopes and Nick Milosevich, fishermen seamen, for a Writ of Certiorari to review the decree of the Circuit Court of Appeals for the Ninth Circuit, entered on the 16th day of August, 1951, reversing a judgment in favor of them for loss of their share of the prospective catch as the result of a collision be-

tween the fishing vessel "BEAR," upon which they were employed, and the "MARSHA ANN," another fishing vessel, entered the 14th day of September, 1950, by the District Court of the United States for the Southern District of California, Central Division, respectfully shows:

Summary Statement of Matter Involved.

Petitioners were employed as fishermen seamen, on board the American fishing vessel "BEAR," for the sardine fishing season commencing October, 1948, and ending about the first day of March, 1949, on a lay or share of the catch as wages [R. 117, 160].

The "BEAR" was proceeding towards the port of Los Angeles, about 11:30 A. M., on the 30th day of November, 1948, in a dense fog when she was struck on her starboard side by the "MARSHA ANN" at a point in the Pacific Ocean approximately two miles southeast of the Los Angeles Harbor Breakwater light [R. 49]. The trial judge found that 38 days was reasonably required to repair the damages to the "BEAR," caused by the collision [R. 47]. All of the crew members of the "BEAR" sought other employment during the period the "BEAR," was laid up for repairs but were unsuccessful, excepting W. H. Hoopes, who earned $500.00 during this period of time.

The lower court found that the negligent operation of the "MARSHA ANN" was the sole and proximate cause of collision with the "BEAR" [R. 63, 64, 65].

It was stipulated between libelants and respondents that the seven libelants and intervening libelants Nick Milosevich and W. H. Hoopes sustained a loss of $918.00 each as and for the loss of their fishing time, which was for

the prospective catch of the "BEAR" for the 38 days during which it was laid up for repairs [R. 613].

The trial judge held that the fishermen members of the crew of the "BEAR" had a cause of action against the respondents for the loss of their lay of the prospective catch of the "BEAR" during the repair period [R. 49 to 60]. Pursuant to the stipulation with reference to the loss of the prospective catch upon the part of the fishermen the court below awarded $918.00 to each of the crew members excepting to W. H. Hoopes, who was awarded $418.00 after the deduction of the $500.00 earned by him from another employment during the repair period.

The Circuit Court of Appeals held that the crew members have no cause of action against the tort-feasor for the loss of their share of the prospective catch of the "BEAR" during the period it was laid up for repairs, but on the contrary—affirmed the recovery of the crew member's share to the intervening libelant Korgan, who was also an owner.

The Circuit Court further sustained the finding of the lower court that the negligence in the operation of the "MARSHA ANN" was the direct and sole cause of the collision [R. 590].[1]

The Basis of the Court's Jurisdiction.

The jurisdiction of this Court is based upon Title 28, U. S. C. A., Section 1254.

The date of the judgment sought to be reviewed is August 16, 1951 [R. 590].

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[1]The testimony of the following witnesses at the following pages have no bearing upon the petition herein:

Louis Sims, 300-350, 559-568; Arthur Williams, 446-493; Robert T. Petrovich, 493-508; Steve Kuljis, 509-523; Anthony Bozanich, 524-534; Arthur DeFever, 534-555, and Nick Milosevich, 556-559.

Questions Presented.

(1) Did the Court of Appeals misapply *Robins Dry Dock and Repair Co. v. Flint,* 275 U. S. 303?

(2) Do fishermen seamen employed on a lay or share agreement, have a cause of action against the tort-feasor for their share of the prospective catch lost as a result of a collision in which their vessel is damaged?

Reasons Relied Upon for the Allowance of the Writ.

(1) The decision of the Circuit Court of Appeals for the Ninth Circuit in this case upon the question of the existence of a cause of action by a seaman for his loss of wages resulting from the tort of a third party is the result of a misapplication of the doctrine set forth in *Robins Dry Dock and Repair Co. v. Flint,* 275 U. S. 303.

(2) The decision of the Circuit Court of Appeals of the Ninth Circuit in this case upon the question of the existence of a cause of action in a fisherman or owners for loss of wages resulting from the negligence of a third party is in conflict with the applicable decisions in the following circuits, District and state:

The Umbria, 166 U. S. 404, 421, 41 L. Ed. 1053, 1062, 17 S. Ct. 617;

Ninth Circuit—

A. T. & S. F. Ry. Co. v. California Sea Products, 51 F. 2d 466, 1931 A. M. C. 1470;

Van Camp Sea Food Co. v. Di Leva, 171 F. 2d 454.

District Court, District of Massachusetts—

The Mary Steele, 2 Lowell 37 Fed. Cas. No. 9226;

Ferlito v. Gaston, 25 F. 2d 461;

Oriel v. Sea Owl, 1948 A. M. C. 445;

The Fanny F. Hickey, 1931 A. M. C. 794;

District Court, Eastern District of New York—

The Columbia, 6 Ben. 398, Fed. Cas. No. 3035.

And English cases—

The Gleaner, 3 Asp. Mar. Cas. 582;

Risoluto, 5 Asp. Mar. Cas. 93.

State of California—

Pacific Star Whaling Co. v. Alaska Packers Assoc., 138 Cal. 632.

(3) This is a case of first impression in the Supreme Court, and the question before this Court is of great importance, involving the rights of more than a quarter million fishermen seamen engaged in the fishing industry of the United States incorporating the areas from the Bering Sea to South America on the Pacific Coast, and from the Banks of Newfoundland to Panama on the Atlantic and Gulf coasts.

(4) The conclusion of the Court that the fishermen, employed on the lay or share agreement, have no cause of action, either directly or through the master or owners, for the loss of their earnings sustained by them through the negligence of a third party, is in direct conflict with an applicable decision of this court in

The Umbria, 166 U. S. 404, 421, 41 L. Ed. 1053, 1062, 17 S. Ct. 617;

and is in direct conflict with the decisions of the courts of the following districts and states dealing specifically with damages sustained by fishing vessels and their crews by reason of collision.

Ninth Circuit—

A. T. & S. F. Ry. Co. v. California Sea Products, 51 F. 2d 466, 1931 A. M. C. 1470;

Van Camp Sea Food Co. v. DiLeva, 171 F. 2d 454.

District Court, District of Massachusetts—

The Mary Steele, 2 Lowell 37 Fed. Cas. No. 9226;
Ferlito v. Gaston, 25 F. 2d 461;
Oriel v. Sea Owl, 1948 A. M. C. 445;
The Fanny F. Hickey, 1931 A. M. C. 794.

District Court, Eastern District of New York—

The Columbia, 6 Ben. 698, Fed. Cas. No. 3035.

And English cases—

The Gleaner, 3 Asp. Mar. Cas. 582;
Risoluto, 5 Asp. Mar. Cas. 93.

State of California—

Pacific Star Whaling Co. v. Alaska Packers Assoc., 138 Cal. 632.

(5) The action of the Circuit Court of Appeals and of its judicial officers in their official capacities, even though taken for the enforcement of private rights, is federal action within the provisions of the Fifth Amendment that Congress shall not deprive any person within its jurisdiction of life, liberty or property without due process of law.

Shelley v. Kraemer, 334 U. S. 1.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit should be granted.

DAVID A. FALL,
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IN THE

Supreme Court of the United States

October Term, 1951.

No. .....

Joseph Ancich, John Kaiza, Anton Bogdanovich, Peter Svorinich, Martin Miskulian, Ray Zukowski, William T. Decker, W. H. Hoopes and Nick Milosevich,

Petitioners,

vs.

Jack Borcich, Andrew Vilicich and Bortul Zankich, Co-Owners of the Oil Screw Marsha Ann,

Respondents.

Brief in Support of Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals is reported at 191 F. 2d 392, and is printed in the record [R. 590].

The opinion of the District Court for the Southern District of California, Southern Division, is reported in 92 Fed. Supp. 929, and appears in a memorandum decision in the record at pages 46-48 and an opinion in the record at pages 49-60.

Specification of Errors.

(1) The Circuit Court of Appeals erred in holding that no cause of action exists by or on behalf of members of the crew of a fishing vessel, employed on the lay or share agreement, for admitted damages (loss of their share of the prospective catch) sustained by them as the direct result of the negligence of a tort-feasor.

(2) The Circuit Court of Appeals erred in making the following ruling:

> "Appellees rely on *Van Camp Sea Food v. DiLeva, supra.* In that case the court allowed plaintiff fishermen (whose compensation consisted of a share of the catch) to recover directly for loss of earnings due to damage to the vessel caused by the negligent navigation of another vessel which was also owned and operated by the plaintiff's employer. The court held that the fishermen could maintain that character of action in their own name on the theory that the owner of the boat could not be expected, as trustee, to bring an action on behalf of the crew against himself for his own negligence. The decision was bottomed on its own peculiar facts and we think that it is not authority for the recovery sought here."

(3) The Circuit Court of Appeals erred in making the following ruling:

> "Their loss arises solely out of their contract with the owners of the 'BEAR' to fish aboard that vessel for a share of the catch and under the rule of the Robins case these crew members have stated no claim upon which relief can be granted."

(4) The Circuit Court of Appeals erred in making the following ruling:

> "The judgment allowing a recovery to all of the nine crew members of the 'BEAR' is reversed."

(5) The Circuit Court of Appeals for the Ninth Circuit erred in failing to follow the sound reasoning of the previous decisions in the Ninth Circuit permitting a fisherman to maintain an action in his own name for loss of earnings due to damage to his vessel caused by the negligent navigation of another vessel.

THE ARGUMENT.

POINT I.

In View of the Manifest Injustice in Denying the Fisherman a Right to Recover His Share of the Prospective Catch, There Should Be a Re-analysis of the Law and a Reversal of the Judgment of the Circuit Court of Appeals in This Case.

This case is one of first impression in the Supreme Court involving the right of fishermen to recover damages sustained by them in the loss of the prospective catch, when employed upon the lay plan.

The crew of the "BEAR," as has been the custom since the earliest American fishing ventures, was engaged on the lay or share basis as wages [R. 117, 160]. This form of employment has been, for many years, almost wholly confined to fishing vessels. Share contracts were referred to in the laws of Wisby and all of the earliest maritime laws and codes. *The Crusader*, 6 Fed. Cas. 926, 928, Fed. Case No. 3,456; *The Elk*, 1938 A. M. C., 714 (D. C. Mass.). This form of employment was called by Judge Ware, in *The Crusader, supra*, at p. 927, "a species of imperfect partnership. The fishermen become directly interested in the fruits of the adventure, and depend for their remuneration upon its success. The crew members were employed for and engaged in fishing for sardines during the then existing sardine season [R. 118, 124]. Seasonal engagement has been the custom for many years

in the sardine fishing industry. "BLUE SKY," *Mason v. Evanisevich*, 131 F. 2d 858; "BESTY ROSS," *Cekalovich v. Ruljanovich*, 145 F. 2d 688. This form of employment, as we shall call, "an imperfect species of partnership," gives the fisherman a right to remain aboard his vessel for the full period of his employment. While this may not give, by strict interpretation, a true possessory right, it does, because of the uniqueness of the employment, give to the crew member a right akin to the true possessory right. We must now realize that *Robins Dry Dock and Repair Co. v. Flint*, 275 U. S. 303, has no application in the question presented in the case at bar Because of the seasonal employment, if it is breached during the season, the fisherman is prevented from pursuing his occupation for the remainder thereof. After the sardine fishing season has commenced, all fishing vessels are fully manned for the entire season [R. 160, 178-179, 244].

In other words, if a fishing vessel is damaged during the season, the members of the crew are out of employment until the vessel resumes fishing. A seaman loses his opportunity of employment with the loss of, or damage to, his vessel, requiring repairs. This loss of employment continues until his vessel resumes fishing or until he obtains employment at the commencement of the next fishing season.

It is elementary, and we find the same in Hornbook law, that one who, by his negligence, injures the property in which another has a property or possessory right, is liable therefor.

The tort feasor is liable for his negligent act to a person who has a lawful possessory right in a chattel, even though that possessory right arises by reason of a contract with the owner of the chattel. For instance, a person having a possessory right to the use of an automobile,

is damaged in that possessory right when that automobile is negligently damaged by a tort feasor. It is no answer to a claim of damage to the right of possession and use that the right to possession and use arose out of a contract with the owner of the automobile. The tort feasor may not escape liability by saying, "True, I am liable to the *owner* of the damaged automobile but not the possessor for I did not know of the contract with the owner giving him the right to possession." This would not excuse the tort feasor from liability to the one in possession for damages for the loss of use of the automobile. This is similar to the nature of the loss sustained by the fishermen members of the crew of the "BEAR."

Supposing a tenant in possession of a store building had the right of possession by virtue of a lease from the owner. An automobile negligently ran into the building and destroyed a plate glass window and portions of the interior. Would anyone urge that the tenant in possession of the building was not entitled to recover against the negligent tort feasor for the damages sustained to his possessory right, namely, his right to use the building during the period while the same was being repaired, notwithstanding that the tenant's right to possession was based upon a contract with the owner of the building?

It is respectfully submitted that the learned Justice Holmes, in the brief decision, was more concerned with the question of the contract liability, which admittedly did not exist, and he did not give proper consideration to the liability of the negligent tort feasor, resulting in a decision which has already, and which will in the future, cause great mischief in the United States Courts. The Circuit Court relies solely upon *Robins Dry Dock and Repair Co. v. Flint, supra,* in support of their decision, notwithstanding the fact that no contract existed between the owner of the "BEAR" and the negligent tort feasor—the "MARSHA ANN."

There are but two theories on which Robins Dry Dock can be justified and explained and limited to the facts thereof:

(a) The charterers and libelants below, held under a time charter party. As the justice states, "The District Court allowed recovery on the ground that the respondent had a 'property right' in the vessel, though it is not argued that there was a demise, and the owners remained in possession." The fact that the owners remained in possession and operate the vessel, is characteristic of a *time charter party*. This is distinguishable from the situation presented under a bare boat charter. Under the bare boat charter, the charterers have a property and possessory right in the vessel. This is not the fact in the case of a time charter party such as was before the court in *Robins Dry Dock and Repair Co. v. Flint, supra*, and the charterers having no property right in the vessel nor any possessory right, were not damaged by the tortious act.

(b) From a practical standpoint, throughout the *Robins Dry Dock* case, *supra*, the court had foremost in its mind, the outstanding fact that the owners of the vessel had effected a settlement with Robins Dry Docks Company and given them a release of all their claims. This fact appears early in the decision (P. 307) and the court concluded with the following quotation: "* * * there is no analogy to the present case when the owner recovers upon a contract for damage or delay. *Winkfield*, (1902) Prob. 42, 3 B. R. C. 68—C. A.; *Brewster v. Warner*, 136 Mass. 57, 59. Decree reversed."

Compare the decision of the Circuit Court with *Van Camp Sea Food Company v. DiLeva*, 171 F. 2d 454. In that case it was apparent to Judge Denman that great injustice would befall members of the crews of fishing vessels such as was done in the present case, if admiralty

did not give effect to equitable principles. He said, "While an admiralty court does not have general equitable jurisdiction it acts upon equitable principles and should give relief where a court of equity would relieve and a court of law would not. *Watts v. Camors,* 115 U. S. 353, 361; *O'Brien v. Miller,* 168 U. S. 287, 297; *United States v. Cornell S. S. Co.,* 202 U. S. 184, 194; *Schoenamsgruber v. Hamburg Line,* 294 U. S. 454, 457, 1935 A. M. C. 423. We hold that appellee's libel states a cause of action against appellant. *Cf. The Petrel* (1893), L. R. P. 320, 62 L. J., p. 92."

There is no true or other distinction between the case at bar and *Van Camp Sea Food Company v. DiLeva, supra.* In the latter case, while it is true the same company owned both fishing vessels, the court held that the members of the crew of one vessel were not fellow servants of the captain and the crew of the other, and could maintain in their own names the action for the damages they had sustained. The fact that the two vessels in the case at bar were not jointly owned by the same party, offers no basis upon which the court could deny the recovery of the damages admittedly sustained by the fishermen seamen. The owners of the "BEAR" offered, in the District Court below, to sue for the crew members if the court felt that this was necessary. The same offer was renewed before the Circuit Court of Appeals below.

Respondents contended there was, at least, *mutual fault* and if petitioners herein recovered and the court held there was mutual fault, then respondents desired to be in a position in the District Court to obtain judgment against the "BEAR" for one-half of any judgment the fishermen recovered against respondents [R. 258, 259, 353—356]. This contention places these petitioners in the same position as that occupied by the libelants in *Van Camp Sea Food Co. v. DiLeva, supra.*

In *Van Camp Sea Food v. DiLeva, supra,* the court held the fishermen had a cause of action. In the case at bar, this same Circuit Court held that the fishermen did not have a cause of action. These decisions are diametrically opposed. The decision in *Van Camp Sea Food v. DiLeva, supra,* gave effect to equitable principles. The Circuit Court of Appeals in the case at bar has failed to recognize that the courts of admiralty are not governed by the strict rules of the common law but act upon enlarged principles of equity. Mr. Justice Story in *The Virgin,* 8 Pet. 538. 550, 8. L. Ed. 1036, 1040, held that admiralty courts "in the exercise of their jurisdiction, are not governed by the strict rules of the common law, but act upon enlarged principles of equity." Later, Mr. Justice Gray in *Watts v. Camors,* 115 U. S. 353, 361, stated that, "In England and in this country, a court of admiralty, within the scope of its powers, acts upon equitable principles; and when the facts before it, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, *it is the duty of the court of admiralty to grant relief.*" Likewise, the converse of the situation before the court in the present case, was before this court in *U. S. v. Cornell S. S. Co.,* 202 U. S. 184, 194. In that case, this court re-affirmed that a court of admiralty shall apply equitable principles to subjects within their jurisdiction.

This court is again faced with an encroachment upon the rights of seamen of which we were warned by Justice Story in *Harden v. Gordon,* Fed. Cas. No. 6047. This court has consistently held that seamen are wards of admiralty and will liberally interpret rules devised for the

benefit and protection of seamen, who are wards of admiralty.

Calmar S. S. Corp. v. Taylor, 303 U. S. 525;
Robertson v. Baldwin, 165 U. S. 275;
Cortes v. Baltimore Insular Line, 287 U. S. 367, 377;
The Arizona v. Anelich, 298 U. S. 110.

The fact that the Circuit Court of Appeals below held that the seaman who was not an owner was not entitled to recover for his admitted loss of wages, lay or share, is an outstanding encroachment upon the rights of those seamen.

POINT II.

The Case of Robins Dry Dock and Repair Co. v. Flint, 275 U. S. 303, Was Misapplied by the Court of Appeals.

We find a learned analysis of the full purport of *Robins Dry Dock and Repair Company v. Flint,* 275 U. S. 303, by Professor Charles Carpenter, in 41 Harvard Law Review, 728. In the *Robins Dry Dock* case, *supra,* the owners of a vessel had a contract with Robins to dry dock the vessel every six months. The owners time chartered the vessel to Flint, but remained in possession. While in dry dock, the propellor of the vessel was negligently damaged by dry dock employees, and the vessel laid up for some two weeks, as the result thereof. The owners settled with the dry dock company for all damages sustained by them. The dry dock company did not know of the time charterer until after the propellor was damaged. Subsequently, the time charterer sued for damages and this court held they were not entitled to recover.

In 41 Harvard Law Review, at page 740, Professor Carpenter in his analysis of the *Robins Dry Dock* case, *supra,* states "negligently damaging the propellor of the vessel, which interfered with the contract of a charterer was recently held by the U. S. Supreme Court in *Robins Dry Dock and Repair Company v. Flint,* not to be actionable. The court said the question is whether the respondents have an interest protected by the law against the unintended injury inflicted upon the vessel, by a third party who knew nothing of the charter contract. *Where the contract is unknown to the tort feasor and he is not unreasonable in not discovering its existence,* it would seem obvious that he has not been negligent toward the charterer or his interest. The case is *not* one refusing damages because the interference with contract relations was merely negligent. There was no negligent interference with a contract relation." (Emphasis added.)

Professor Carpenter then goes on to show that there are a number of American cases which allow damages for negligent interference with contract relations.

This court, in *Robins Dry Dock* case, *supra,* was very explicit in pointing out that there was no knowledge of any contract relation between the owners and charterers. This being so, there could be no duty imposed upon the Robins Dry Dock Company to exercise due care toward the time charterer. No duty being thus imposed, there was no negligence on the part of the Robins Dry Dock Company as against any contractual interest of the time charterer, Flint.

This is not the situation presented in the case at bar. We have a collision between two fishing vessels engaged

in the same fishing industry and even fishing in identical areas [R. 102, 103, 147, 388].

The "MARSHA ANN" was equipped with radar and the skipper of the "MARSHA ANN" knew of the exact position of the "BEAR," at least, when the "MARSHA ANN" had reached the breakwater outside of Los Angeles Harbor [R. 422, 423, 433]. The radar operator of the "MARSHA ANN" knew that the vessel, which was the "BEAR," was a fishing vessel, and advised his skipper as to her position at all times [Rep. 424, 425, 428, 429, 440, 441]. The crews of the respective vessels knew each other even well enough to call to each other by their nick-names [R. 110, 128, 131, 175, 177, 215, 372]. The trial judge heard and saw the witnesses and must have and did infer that the respondent knew, prior to the collision, that the vessel approaching them was a fishing vessel, and as such was operating under a lay or share agreement.

In brief, the "MARSHA ANN" knew of the "BEAR'S" presence, knew that she was a fishing vessel, knew of the existence of the lay or share plan in her operation and could reasonably foresee that a collision with the "BEAR" would deprive these fishermen of their possessory interest to remain aboard the "BEAR" and to enjoy the fruits of their catch under the lay agreement. Notwithstanding this knowledge and the foreseeability of the injury that their negligence would cause to these fishermen, the "MARSHA ANN" continued blindly on her course and negligently collided with the "BEAR". The breach of this duty by the operators of the "MARSHA ANN," to use due care toward the possessory and contractual rights

of these fishermen, was the direct cause of the resulting damage sustained by these Petitioners. The court was warranted in finding that there was willful negligence amounting to an intentional interference with the contractual rights of these fishermen. The law is well settled that an intentional interference with a contractual right may give rise to a cause of action. *Angle v. St. Paul Minneapolis & Omaha Ry. Co.* 151 U. S. 1. The duty to use due care to avoid causing unintended harm to others should in any symmetrical system be equally comprehensive. If recovery may be had for a certain injury, when it is intentionally inflicted, it should likewise give rise to an action when it is caused by negligent conduct. Consequently, if the court would take cognizance of this sort of damage if it were intended, it should likewise take cognizance, where, as here, the foreseeability of harm to these fishermen, raised a *duty* to abstain from the negligent conduct of which the trial judge and the Circuit Court of Appeals found the Respondents were guilty. In conclusion, these Respondents owed a duty toward these fishermen; this duty was breached; and as a direct result of the breach of this duty, these fishermen were damaged. This court should follow the equitable principles as laid down in the *Van Camp Sea Food Co. v. DiLeva, supra,* and allow these fishermen to recover the damages that they have sustained as a direct result of the negligence of the tort feasor. In *Evens v. Texas Pac. Mo. Terminal R. of New Orleans,* 134 F. 2d 275, Certiorari denied, 63 S. Ct. 1175, 319 U. S. 756, 87 L. Ed. 1709, this court stated that "Wanton negligence is an act, or failure to act when there is a duty to act, in reckless disregard of the rights of another, coupled with a

consciousness that injury is a reasonable consequence of the act or omission."

In *Jefferson v. King*, 12 La. App. 249, the court quoted the definition of reckless disregard of safety as defined in Section 500, page 1293 of Restatement of Torts.

> "The actors conduct is a reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him."

The operation of the "MARSHA ANN" constituted a willful disregard of petitioner's rights.

The Circuit Court below cited *Hayes v. Luckenbach S. S. Co.*, 92 Fed. Supp. 684, as following the *Robins Dry Dock* case, but this case is only in point as far as the Dicta of the court is concerned. Article First of the Libel stated "In ordinary course but for the collision, they would have engaged in fishing operations for a period of time sufficient to have made at least three fishing trips out of the port of Boston, Mass. This loss of use of the trawler 'LUCKY STAR' and the consequent loss of job opportunities thereon was caused solely and wholly by the fault of said Libellees, jointly and severally, as more particularly hereafter set forth." There is no question that the court properly sustained the exceptions to the libel as the pleading was insufficient. The remaining comments of the court were dicta and not necessary to the decision.

POINT III.

The Action of the Circuit Court of Appeals in Denying the Fishermen a Right to Recover the Admitted Loss Sustained by Them as a Result of the Negligent Action of the Tort Feasor Is a Violation of the Constitutional Rights Guaranteed in the Fifth and Fourteenth Amendments.

Judicial enforcement or denial by a Constitutionally created Federal Court of private rights constitutes governmental action. Action is no less governmental because it is taken by the judicial rather than legislative or executive branches of the government.

Pennoyer v. Neff, 95 U. S. 714;

Chambers v. Florida, 309 U. S. 227;

American Federation of Labor v. Swing, 312 U. S. 321;

Cafeteria Employees Union v. Anglas, 320 U. S. 293;

Craig v. Harney, 331 U. S. 367;

Shelley v. Kraemer, 334 U. S. 1.

This is true, even where the judicial action is based upon common law enforcement or denials of property rights and interests.

American Federation of Labor v. Swing, 312 U. S. 321;

Cafeteria Employees Union v. Anglas, 320 U. S. 293.

The judicial denial by the Circuit Court of Appeals to these fishermen of the right to enforce their property interests has no greater Constitutional justification than

slative enactments which would deny these same fish-
en their property rights without "due process of law"
"without just compensation." The courts may not
used to destroy rights which are protected against in-
gement or deprivation by the constitutional guarantee
lue process and equal protection of the loss.

o long as the denial and deprivation of property
nts remain in the area of voluntary individual action,
Fifth and Fourteenth Amendments have no appli-
on. Where, however, the individual action is effectu-
l and upheld by governmental action through judicial
orcements, Constitutional restraints of "due process"
"just compensation" clauses of the Fifth and Four-
nth Amendments apply.

Truax v. Raich, 239, U. S. 33;
Buchanan v. Waily, 245 U. S. 60.

Conclusion.

We respectfully submit that the petitioners and mem-
s of the crew of the "BEAR" have been clearly wronged
the misapprehension and mis-application of *Robins*
y Dock and Repair Co. v. Flint; that the petitioners
e a just cause of action for the recovery of an ad-
ted loss which occurred through the negligence of
hird party tort feasor; that the principles of equity
ich a court of Admiralty should apply, especially in
or of these seamen who are wards of admiralty, dictate
t the petitioners herein have a cause of action for the
nages sustained by them through the negligent act
a third party tort feasor, and that in view of the ap-
ent inconsistency of the decisions of the Ninth Circuit

Court of Appeals and the conflict of the decisions of the Ninth Circuit Court with other District Courts and the apparent conflict with a decision of the Supreme Court, can only be harmonized and corrected by a clarifying decision of the United States Supreme Court in this case.

Respectfully submitted,

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[redacted]

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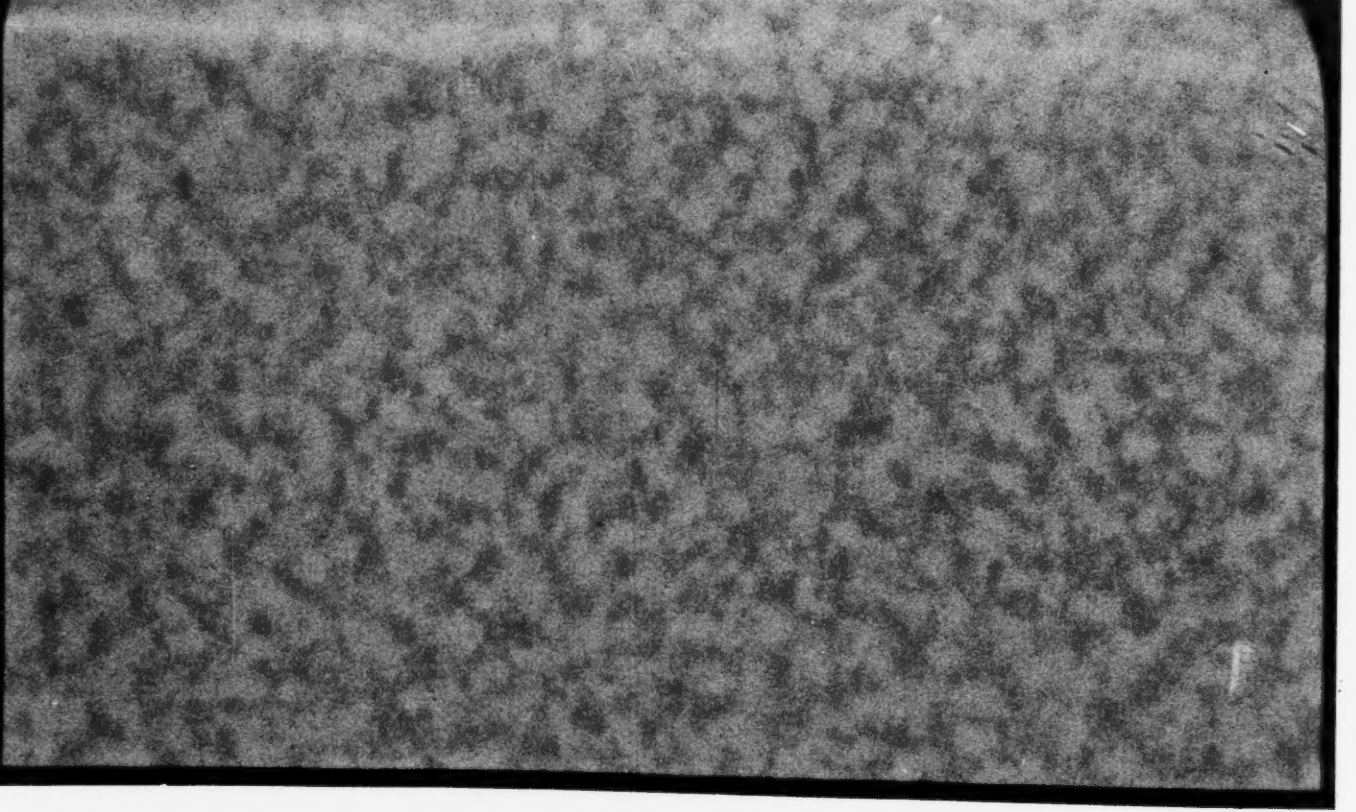

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.
No. 417

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, W. H. HOOPES and NICK MILOSEVICH,

Petitioners,

vs.

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-owners of the Oil Screw Marsha Ann,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Opinions of the Courts Below.

The opinion of the Court of Appeals for the Ninth Circuit is reported at 191 F. 2d 392, and is printed in the record [R. 590].

The opinion of the District Court for the Southern District of California, Southern Division, is reported in 92 Fed. Supp. 929 and appears in the record at pages 49-60.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented.

1. Do fishermen working on a lay or share basis, but who may quit at any time have a cause of action against a negligent tort feasor for their alleged shares of the profits from the prospective catches purportedly lost as a result of a collision between the vessel owned by the negligent tort feasor and the vessel upon which the fishermen were working?

Statement.

This is an action in Admiralty growing out of a collision in a dense fog on the morning of November 30, 1948, between two fishing vessels, the oil-screw MARSHA ANN and the oil-screw BEAR. The collision occurred just outside the breakwater at the entrance to San Pedro Bay in California.

The original libel was filed by seven of the crew members of the BEAR against the MARSHA ANN and the owners thereof for *wages and maintenance*. An intervening libel was filed by George Korgan and Sam Bilas, as owners of the BEAR for collision damages and by the two remaining crew members of the BEAR for *wages and maintenance*. Neither libelants nor intervening libelants sued for an injury to, or destruction of, any alleged property right or possessory right.

The owners of the BEAR sought to recover for necessary repairs, for surveyor's fees and for loss of the use of the BEAR for the time it was being repaired. The crew members were employed for the sardine season on the lay plan, whereby the crew received 68% of the proceeds—to be divided equally, and the remaining 32% went to the vessel and to the net.

Although the crew members were supposedly employed for the entire sardine season they could quit at any time [R. p. 236], and on the other hand the captain of the BEAR could refuse to take the vessel out fishing even if the crew members desired to fish [R. p. 237].

At the time of trial these respondents objected to the introduction of any evidence on behalf of the said fishermen on the ground that the said libel and intervening libel failed to state a cause of action upon which relief could be granted [R. pp. 98, 99]. None of the fishermen made claims for the loss of earning capacity resulting from any personal injury. No such claim could have been made for the only physical injury arising out of the collision in question was to the BEAR herself. The fishermen's claim for damages was that by reason of the collision and detention of the BEAR the fishermen lost the opportunity to fish upon her and therefore participate in a percentage of any expected income resulting from the prospective catches. The fishermen, therefore, were in effect claiming for loss of use or detention of the BEAR. On July 18, 1950, after the trial of the case on the merits, the trial court ordered *nunc pro tunc* May 31, 1950, that the said objection be overruled.

The trial court found that 38 days was a reasonable time for repairing the BEAR and that the total catch during that period would have been 270 tons of fish of a value of $13,500. He awarded to the owners of the BEAR 32% of this figure ($4,320) for loss of use of the BEAR. The other 68% ($9,180) was awarded to the nine crew members and the one working owner, George Korgan in equal shares of $918 each for loss of earnings during this period.

The Court of Appeals for the Ninth Circuit, after consideration of briefs submitted by all interested parties and an analysis of the law pertaining to the question involved in this case, reversed the judgment of the trial court in this respect. It stated that the loss, if any, of the fishermen arose solely out of their contract with the owners of the BEAR to fish aboard that vessel for a share of the profits of prospective catches and that the said fishermen stated no claim upon which relief could be granted.

Summary of Argument.

1. The action of the Court of Appeals in reversing the trial court is not a violation of the Fifth Amendment to the Constitution in that it does not deprive appellants of life, liberty or property without due process of law.

2. The said decision of the Court of Appeals holding that the fishermen employed on a lay or share agreement have no cause of action for the loss of their share of prospective profits is not in direct conflict with a decision of this court.

3. The said decision is not in conflict with any decision in any Circuit or in any district or in any state or in any country.

4. The decision of the Court of Appeals is correct in that the libel and intervening libel of the fishermen failed to state facts sufficient to constitute a cause of action against these respondents.

On September 7, 1949, Chief Justice Vinson, in an address before the American Bar Association noted:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in

which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court."

Only a superficial reading of the petition and brief in support thereof is necessary to realize that petitioners have attempted to create Constitutional questions and conflicts between the decision of the Court of Appeals and this court and other courts, to come within the above standard set by the Chief Justice. A close analysis of the petition, however, together with an examination of all of the cases and authorities cited therein, clearly reveals that they have failed so to do. None of their cases or authorities support the contentions of petitioners and in fact, are support for the position of these respondents.

ARGUMENT.

I.

The Action of the Court of Appeals for the Ninth Circuit in Reversing the Trial Court Is Not a Violation of the Fifth Amendment to the Constitution in That It Does Not Deprive Appellants of Life, Liberty or Property Without Due Process of Law.

Respondents will not make any extensive effort to show that the holding of the Court of Appeals below is not a violation of the guarantees contained in the Fourteenth Amendment to the Constitution for the plain reason that the said Amendment protects the individual against "State Action" and not against "Federal Action." (U. S. C. A. Const. Amendment XIV.)

The following cases cited by petitioners in support of their claim to this effect conclusively established this fact. *Buchanan v. Warley*, 245 U. S. 60, 38 S. Ct. 16 (cited on page 21 of petitioners' brief as *Buchanan v. Waily*), was a case holding that a municipal ordinance of the City

of Louisville, Ky., was a violation of the Fourteenth Amendment because it made it unlawful for a white or colored person to occupy a house in any block in which a greater number of houses were occupied by persons of the opposite race. This case did not involve federal action.

Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7 (cited on p. 21 of petitioners' brief), was a case holding that the Arizona anti-alien labor law was unconstitutional as being in violation of the Fourteenth Amendment and that an alien had the right to restrain the enforcement of such an unconstitutional *State* law. This case did not involve federal action.

Craig, et al. v. Harney, 331 U. S. 367, S. Ct. 1249 (cited on p. 20 of petitioners' brief), held that the compulsion of the First Amendment made applicable to the *States* by the Fourteenth Amendment forbade the punishment by contempt of comment on pending cases in the absence of a showing that the utterances created a "clear and present danger" to the administration of justice by a *State* court judge.

Shelley v. Kraemer, 334 U. S. 1 (cited on p. 20 of petitioners' brief), held that it was a violation of the Fourteenth Amendment for a *State court* to enforce a restrictive covenant which had as its purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Again, as in the cases discussed hereinabove, this case did not involve federal action. It would serve no useful purpose to analyze the remaining cases cited in support of the petitioners' contention in this regard for the reason that not one of the said cases deals with a situation even remotely similar to the case at hand.

The remaining claim of the petitioners relative to a violation of the Constitution concerns itself with a purported deprivation of property rights without "due process of law" or "without just compensation." In the first place,

petitioners have nowhere shown that they have any "property rights" in the fishing vessel BEAR [R. p. 101]. Clearly, there cannot be a deprivation of property by a lack of due process if there is no "property" or "property right" to protect. Secondly, it cannot be shown that the fishermen have been deprived of the opportunity to prove that they had a "property right." Petitioners initiated their action in the United States District Court, Southern District of California, Central Division [R. pp. 3, 11, 35] where they had a full and complete hearing on the facts and the law. Subsequent thereto, in the Court of Appeals for the Ninth Circuit, they had another opportunity to prove that they had a cause of action. It cannot be said that the refusal of the Court of Appeals to acquiesce in the petitioners' attempt to fabricate a "property right" is a lack of due process. In fact, it cannot be understood how such a judicial determination grounded upon an application of the pertinent rules of law could ever be considered a violation of the Fifth Amendment. And it is submitted that petitioners have failed in their groundless attempt to invent and inject a constitutional question in this case.

II.

The Decision of the Court of Appeals Holding That the Fishermen Employed on a Lay or Share Agreement Have No Cause of Action for the Loss of Their Share of Prospective Profits Is Not in Direct Conflict With a Decision of This Court.

Petitioners contend at page 5, paragraph (3) of their petition that this is a case of first impression in the Supreme Court. On the other hand, they maintain that the decision of the Court of Appeals is in conflict with an applicable decision of the Supreme Court (Pet. p. 5, par. (4)). It is significant that neither of these contentions is correct. As will be shown later on in this brief the principle involved in the case at bar is not before this

court for the first time. And respondents will now show that the decision of the Court of Appeals is not in conflict with any decision of the Supreme Court.

In support of their claim that the decision of the Court of Appeals is in conflict with the decision of this court the petitioners cite the UMBRIA, 166 U. S. 404, 41 L. Ed. 1053, 17 S. Ct. 610. Let us examine the decision in this case to determine whether it is in point in any respect whatsoever or whether it supports the claim of petitioners.

That case was a suit in Admiralty brought in the District Court in the Eastern District of New York by the *owners* of the French steamship IBERIA against the British steamship UMBRIA to recover damages for a collision which took place in a dense fog off the coast of Long Island. The IBERIA was a total loss. The recovery was limited to the value of the ship with interest. There was no allowance for profits of a future voyage for which a charter had already been signed at the time of the collision.

In the case at bar the fishermen are suing for damages for the loss of use or detention of the vessel owned by their employers. *In the Umbria the crew members did not bring the action either through the owners or otherwise. The owners sued for their own damages as a result of the loss of their vessel.*

III.

The Decision of the Court of Appeals Is Not in Conflict With Any Decision in Any Circuit or in Any District or in Any State or in Any Country.

On pages 4, 5 and 6 of their petition, petitioners attempt to show that the decision of the Court of Appeals is in conflict with various decisions in other circuits, districts, states and countries. A study of these cases, however, shows that no such conflict exists. For example:

The Gleaner, 3 Asp. Mar. Cas. 582 (Pet. p. 5), was an action brought against the trawl fishing smack GLEANER by the owners of the drifted net fishing smack MAUD AND FLORENCE to recover damages in respect of a collision between the vessels where the fishing gear of the MAUD AND FLORENCE was lost. This was an action by the *owners* of a vessel for physical damage to property owned by them.

Atchison T. & S. F. Ry. Co. v. California Sea Products Co., 51 F. 2d 456 (Pet. p. 5), was an appeal from the final decree of the U. S. District Court for the Northern District of California, Southern Division, awarding the *owners* of a vessel demurrage on the estimated loss of profits from whale fishing on account of the detention of the owner's vessel. Again this is a case where the owners sued for damages arising out of physical injury to *their* property. The Appellate Court reversed the District Court and held that even the owner was not entitled to damages for loss of prospective profits in this case.

The following cases involve actions by the owners of vessels and do not in any wise concern any actions by the crews of such vessels, hence they, too, are not in point in this matter.

Ferlito v. Gaston, 25 F. 2d 461 (Pet. p. 4);

The Fannie F. Hickey, 1931 A. M. C. 794 (Pet. p. 4);

Ariel-Sea Owl, 1948 A. M. C. 445 (Pet. p. 4);

Pacific Steam Whaling Co. v. Alaska Packers Association, 138 Cal. 632 (cited on p. 6 of Pet. as *Pacific Star Whaling Co. v. Alaska Packers Association*).

A further distinction in the *Pacific Steam Whaling* case is the fact that the wrongful act therein complained of was an *intentional* act and not a negligent act as in the case at bar.

The Mary Steele, Fed. Cas. No. 9226 (D. C. Mass, 1874) (Pet. p. 4), and *The Columbia*, Fed. Cas. No. 3035 (D. C., E. D. N. Y., 1877) (Pet. p. 5) are cases which the trial court (whose decision petitioners are trying to reinstate) said do not sustain the right to a cause of action in the crew [R. p. 56]. Little else need be said to show that these cases certainly have no application to the case at hand.

IV.

The Decision of the Court of Appeals Is Correct in That the Libel and Intervening Libel of the Fishermen Failed to State Facts Sufficient to Constitute a Cause of Action Against These Respondents.

As already mentioned above, the petitioners were fishermen working on a lay or share basis on the vessel BEAR, supposedly for the entire sardine season; however, the captain of the BEAR could refuse to go fishing if he so desired in direct opposition to the wishes of the said fishermen, and the fishermen on the other hand could quit their employment at any time during said season.

On page 10 of their brief petitioners admit that they had no proprietary or possessory right in the BEAR. They claim, however, that they have a right "akin to the true possessory right." The libel and intervening libel [R. pp. 3, 11, 35], however, are for "wages and maintenance" and are not for damages because of an injury to any alleged "possessory right" or any right "akin to a true possessory right." Despite the obvious fact that they do not have any proprietary or possessory right in the BEAR, the fishermen throughout their petition and brief attempt to take advantage of law protecting proprietary and possessory rights. In fact, they attempt to show by reference to a statement by Judge Ware in *The Crusader*, 6 Fed. Cases 926, 928, that the employment of fishermen is "a

species of imperfect partnership" (Pet. p. 9). However, petitioners fail to complete Judge Ware's quotation wherein he says,

> "but the fishermen are not in such cases *considered as partners* with the owners in the proper sense of the word. The shares for which they contract are in the nature of wages. . . ." (*The Crusader, supra,* at p. 928.)

Any damages suffered by the fishermen had to arise solely by reason of their contract of employment with the owners of the BEAR to fish at will on the future voyages of the BEAR. The law, however, does not afford these fishermen any remedy against respondents. The damages claimed are too remote and cannot be said to have proximately resulted from any act of the respondents. (See:

Robbins Dry Dock and Repair Co. v. Flint, 275 U. S. 303, 48 S. Ct. 135, 72 L. Ed. 290 (1927);

Remorquage v. Bennetts, 1 K. B. 243;

The Federal No. 2, 21 F. 2d 313.

The petitioners have made certain vague attempts to distinguish away the doctrine of the *Robbins* case, *supra.* However, let us make a step by step comparison of the essentials of that case and the case at bar and see for ourselves whether any valid distinction exists in fact.

1. In the *Robbins* case as here the suing parties did not own the property damaged and they had no right to the possession of the said property.

2. There as here the suing parties claimed that because of a negligent tort feasor's damage to the owner's property they were entitled to collect damages by reason of having been prevented from carrying out a contract with the owner of the said damaged property.

3. There as here the negligent tort feasors did not know of the alleged contract that complainants had with

the owners and in fact, did not know of the said contract until the time of the collision [R. p. 429], and did not even know until the collision that the other vessel was the BEAR. (In this connection it should be noted that on page 17 of their petition and brief the fishermen contend that the trial judge must have inferred that these respondents had this knowledge. However, to correct this erroneous contention, it is pointed out that the trial judge made no such finding and the record is completely devoid of any such evidence.)

To minimize the effect and soundness of the doctrine of the *Robbins* case petitioners have made collateral attacks on the periphery of the said decision. Such attacks are eminently unfair and to correct the erroneous impression that might be gathered from such attacks, respondents will analyze the said case in detail and quote therefrom, and will not content themselves with a synthetic interpretation of what that court's opinion might have been or what might have been in the mind of the Justice writing that opinion.

In that case the propeller of a vessel under time charter was injured and the vessel delayed through the neglect of the operators of the dry dock. The charterer sued the dry dock for loss of use, and, in the lower courts, recovered. That result was reversed in the Supreme Court and all recovery denied. Mr. Justice Holmes said at pages 308-309 of that decision:

> "The injury to the propeller was no wrong to the respondents (the charterer) but only to those to whom it belonged. But suppose that the respondent's loss flowed directly from that source. Their loss arose only through their contract with the owners—and while intentionally to bring about a breach of contract may give rise to a cause of action, *Angle v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, no authority need be cited to show that,

as a general rule, at least, a tort to the person or property of one man does not make the tort feasor liable to another merely because the injured person was under a contract with that other, unkown to the doers of the wrong. See *Savings Bank v. Ward*, 100 U. S. 195. The law does not spread its protection so far. A good statement applicable here, will be found in *Elliott Steam Tug Co., Ltd., v. Shipping Controller* (1922), 1 K. B. 127, 139, 140; *Byrd v. English*, 117 Ga. 191; *The Federal No. 2* (The Glooscap), 1927 A. M. C. 1471, 21 F. (2d) 313."

To the same effect see:

Agwilines Inc. v. Eagle Oil and Shipping Co. (Agwidale-San Veronico), 153 F. 2d 869, 1946 A. M. C. 142 (C. C. A. 2d), cert. den. 328 U. S. 835.

In the *Robbins Dry Dock* case Mr. Justice Holmes referred to the following in *Elliott Steam Tug Co. v. Shipping Controller* (1922), K. B. 127, as being "a good statement."

Scrutton L. J. at pages 139-140.

"In case of a wrong done to a chattel the common law does not recognize a person whose only rights are a contractual right to have the use or services of the chattel for purposes of making profits or gains *without possession of or property in the chattel.* Such a person can not claim for injury done to his contractual rights. . . . The charterer in collision cases does not recover profits, not because the loss of profits during repairs is not the direct consequence of the wrong, but because the common law, rightly or wrongly, does not recognize him as able to sue for such an injury to his merely contractual rights." (Italics added.)

The decision of the Court of Appeals in this case is not in conflict with the decision in *Van Camp Sea Food Company v. DiLeva*, 171 F. 2d 454 (1949 A. M. C. 319), 9th Circuit (1948). In the *Van Camp* case the members of a crew recovered *from their employer* for loss of contract earnings due to layup of their vessel resulting from a collision through the negligent operation of another vessel owned and operated by the same employer. However, it was there observed by the court that an action by the crew could not have been maintained had the offending vessel been owned by "some third party." In its opinion at page 455 the court said:

> "More particularly (appellant's) contention is that if the GLORIA R had been owned by some third party, the appellant, *as owner* of the Bessemer, would have had the sole right to sue the GLORIA R's owner for the GLORIA R's wrong doing. *This latter contention respecting separately owned vessels is the law of this circuit and generally of the admiralty* as stated by this court on a case relied upon by appellant, . . ." (Italics added.)

Surely there is great reason for the holding of the *Robbins* case and other related cases which preclude a cause of action in a case such as this against the negligent tortfeasor. Firstly, a tortfeasor must be held to the damages proximately caused by his act; that is, damages which are reasonably foreseeable. Charged by this standard it cannot be said, and the courts do not so hold, that a tortfeasor must foresee that all persons whose property he may injure have a contract of employment with other persons and that these other persons will be deprived of this contract right. Secondly, to permit recovery against such a tortfeasor would open the door to all sorts of chicanery and fraud between the party whose property was damaged and the claiming parties who could

quite easily and simply fabricate the contract right between them.

At the time respondents appealed to the Court of Appeals they used the following illustration to show that the position of the petitioners herein is untenable. The respondents wish to use the same illustration at this point.

Let us suppose that one of the huge Matson liners was damaged by a negligent tortfeasor. Can it be seriously contended that each of the seamen or other employees aboard that vessel could maintain a cause of action against the said negligent tortfeasor for future wages which would accrue under their respective contracts of employment? The answer must be in the negative and the petitioners have not been able to cite a case to the contrary.

The issues raised by the libel of the fishermen in no way involve the question whether or not the owners of the BEAR may recover against any or all of these respondents. In any event, it cannot be too forcefully stressed that a right in the master or owner of the injured vessel to sue for prospective catches does not give the fishermen an equal and co-existing right to sue for such catches. Any cause of action which the fishermen have must be theirs by virtue of their own right and not by virtue of the right which exists in the owner. The attention of the court is called to the following language on page 309 of *Robbins Dry Dock & Repair Co. v. Flint, supra:*

> "The decision of the Circuit Court of Appeals seems to have been influenced by the consideration that if the whole loss occasioned by keeping a vessel out of use were recovered and divided a part would go to the respondents. It seems to have been thought that perhaps the whole might have been recovered by the owners, that in that event the owners would have been trustees for the respondents to the extent of the respondents' share, and that no injustice would

> be done to allow the respondents to recover their share by direct suit. But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is some one who has a claim to it as against the petitioner. The respondents have no claim against the petitioner. The respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if some one else had recovered it he would have been bound to pay over a part by reason of his personal relations with the respondents."

On June 12, 1950, Judge McCarthy of the U. S. District Court, District of Massachusetts, rendered an opinion in a case whose facts are practically identical with those in the case at bar. The name of this case is *Hayes, et al. v. Luckenbach, et al.*, 92 Fed. Supp. 684.

There the libelants were the captain and the members of the crew of the trawler LUCKY STAR. The libel alleged that the LUCKY STAR was lying made fast at a usual and proper berth at the Boston Fish Pier; that the LYNCHBURG VICTORY while being towed by the ARES and SATURN struck the LUCKY STAR on her starboard side and crushed her against the Fish Pier causing serious damage to the LUCKY STAR.

All respondents filed exceptions to the libel on the ground that the facts averred in the libel were insufficient and did not constitute a cause of action against the respondents within the Admiralty and Maritime jurisdiction of the court.

The court discussed the various cases cited by the appellees in their brief herein together with the decision of

Van Camp Sea Food Co. v. DiLeva, supra, and sustained the exceptions to the libel and dismissed same.

Prior to concluding, respondents would like to make a correction in an error made by petitioners of page 19 of their petition and brief. At that point petitioners apparently in an attempt to make the law of intentional torts applicable to this case say "The operation of the MARSHA ANN constituted a willful disregard of petitioners' rights." (Pet. p. 19.) To correct this error we need only to refer to petitioners' summary statement of matter involved wherein it is said:

> "The lower court found that the *negligent* operation of the MARSHA ANN was the sole and proximate cause of collision with the BEAR [R. pp. 63, 64, 65]." (Pet. p. 2.)

Conclusion.

At the time of trial the court said:

> ". . . in addition to stating to me that the seamen are entitled to recover I would like to have you spell out a theory to me, at least. If you cannot cite a case to me, spell out a theory on which you would give a seaman a recovery" [R. p. 577].

As already shown the petitioners were unable to find any case to sustain any recovery for the fishermen. The decision of the trial court rested upon "a theory" to the effect that the fishermen are "the real parties in interest in such an action as this, and as such should be the parties to bring the libel" [R. p. 59]. But as we have seen from the quotation of the Supreme Court in the *Robbins* case the fishermen cannot be real parties in interest to a cause of action which they do not have.

From the foregoing together with the cases and authorities cited herein, it is clear that the fishermen have no cause of action against the respondents under the law as it now exists. To hold otherwise would be to legislate into existence such a broad concept of liability for negligent acts that the present rule permitting the recovery from a negligent tortfeasor of damages which proximately result from his tortious acts, would be completely abrogated and a negligent tortfeasor would be liable for *all* damages resulting from his negligent act whether the said damages were proximate or remote.

It is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Proctor for Respondents.

HULEN C. CALLAWAY,
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Of Counsel.

DEC 6 1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.
No. 417.

JOSEPH ANCICH, JOHN KAIZA, ANTON BOGDANOVICH, PETER SVORINICH, MARTIN MISKULIAN, RAY ZUKOWSKI, WILLIAM T. DECKER, W. H. HOOPES and NICK MILOSEVICH,
Petitioners,

v.

JACK BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw Marsha Ann,
Respondents.

Motion On Behalf of the Atlantic Fishermen's Union, Seafarers' International Union of North America, American Federation of Labor for Leave to File a Brief as *Amicus Curiae*.

ATLANTIC FISHERMEN'S UNION

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Blanchard Printing Company, Boston, Mass.—12/5/51-(55)

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Respondents.

Motion On Behalf of the Atlantic Fishermen's Union, Seafarers' International Union of North America, American Federation of Labor for Leave to File a Brief as *Amicus Curiae*.

This motion is made on behalf of more than 3000 members of the Atlantic Fishermen's Union, Seafarers' International Union of North America, American Federation of Labor and involves the interests of many thousands more of fishermen seamen fishing out of the ports of the Eastern seaboard.* The Atlantic Fishermen's Union itself main-

*Consent of the parties was requested by the applicant. The petitioning libelants gave their consent. The respondents had not yet replied at the time of the filing of this motion.

tains offices in Rockland, Maine, Boston, Mass., Gloucester, Mass., New Bedford, Mass., and New York, N.Y.: its principal offices lie in Boston.

The Constitution of the Atlantic Fishermen's Union, in part, sets forth among its purposes:

> "4. To use our influence, individually and collectively, in support of legislation improving the maritime, conservation, and labor laws of the United States and of the States, both in their domestic and foreign relationships.
>
> "7. To cooperate with marine and other labor organizations in the interests of marine labor and labor in general, to effectuate these purposes through collective bargaining, and other means we have formed the Atlantic Fishermen's Union and have affiliated with the Seafarers' International Union of North America, American Federation of Labor."

Consistent with these reasons for formation, the petitioner asserts that the substantial rights of fishermen throughout the United States, and, in particular, the constitutionally guaranteed property rights of fishermen on the Atlantic coast will be affected by the ultimate disposition of the case before the Court.

The petitioner Union, presenting this motion in behalf of these concerned fishermen seamen, seeks an opportunity to defend such property rights from invasion by judicial authority. Such deprivation would ensue if the Supreme Court refuses to grant the writ of certiorari in the present case and the decision of the Ninth Circuit stands.

There have been many cases involving identical problems in the Eastern circuits, and, in particular, before the

District Court for Massachusetts, where petitioner maintains its principal branch offices. (*Hayes* v. *Luckenbach S.S. Co.*, 92 Fed. Supp. 684) There has been no conclusive Supreme Court adjudication of these problems which have come before the local courts. Moreover, since this problem is a recurring one, petitioner contends that its rights are vitally involved in this controversy, as the petitioner's members will be bound by this case's outcome in the future. This applicant contends that since it speaks in behalf of fishermen seamen of the Eastern ports, its brief will present the constitutional issues involved on a broad and national basis before the Court.

Traditionally, fishermen seamen have been extended protections as wards of admiralty which differ from, and are, in advance of, rights existing under the common law. That is, fishermen have been allowed recovery against third party negligent tort-feasors whose negligent conduct interferes with the fishermen's advantageous relations—whether express or implied. The decision of the Ninth Circuit denies seamen these immemorial rights and conflicts with decisions of other circuits.

The opinion of the court below is founded on, and tends to establish as a rule of law, a holding which denies to fishermen throughout the United States their right to recover for an admitted loss sustained by them as a result of the negligent action of a third-party tort-feasor. This judicial action is governmental in character (*Craig* v. *Harney*, 331 U.S. 367) and deprives fishermen of property in a manner violative of constitutional rights guaranteed them by the Fifth Amendment. That is, the decision of the Circuit Court constitutes a deprivation "of life, liberty, or property without due process of law" and "without just compensation."

The petitioning Atlantic Fishermen's Union, making this

motion, respectfully urges this Court to accept its brief in view of the significant issues and national scope of the problems involved in the case at bar.

Respectfully submitted,

ATLANTIC FISHERMEN'S UNION, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AMERICAN FEDERATION OF LABOR.

SAMUEL B. HOROVITZ,
Of Counsel.

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IN THE

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Petitioners,

vs.

BORCICH, ANDREW VILICICH and BORTUL ZANKICH, Co-Owners of the Oil Screw Marsha Ann,

Respondents.

MOTION FOR LEAVE TO FILE STATEMENT AMICUS CURIAE, AND STATEMENT.

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TABLE OF AUTHORITIES CITED

CASES

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MOTION FOR LEAVE TO FILE STATEMENT AMICUS CURIAE, AND STATEMENT.

Comes now Fishermen and Allied Workers Division, International Longshoremen's and Warehousemen's Union and moves this Honorable Court for leave to file a statement in support of the petition for writ of certiorari heretofore filed herein; and in support of said motion the said moving party, hereinafter called the "Fishermen's Union," shows as follows:

The Fishermen's Union is composed of fishermen employed on commercial fishing vessels engaged in fishing in the waters of the Pacific Coast states and of Alaska.

The issues presented by the above entitled action and by the pending petition for writ of certiorari are of common and general interest to all of the members of the Fishermen's Union and to the industry of which the Union and its members are a part, as is more fully hereinafter set forth.

Members of the Fishermen's Union are libelants in an action recently decided in the United States District Court for the Southern District of California, entitled *Carbone, et al. v. The Fishing Boat "Del Rio," etc., et al.,* being No. 10680-C, in which the trial court on November 14, 1951, made and entered an order denying relief to libelants solely upon the authority of the decision of the Court of Appeals for the Ninth Circuit in this action.

For all of the foregoing reasons, as well as by virtue of the circumstances therein set forth, the Fishermen's Union asks leave to file, and requests this Honorable Court to consider, the following statement in support of the pending petition for writ of certiorari.

Statement.

The commercial fishing industry is one of the principal enterprises in the Pacific Coastal area. In 1949 total payments for fish made to owners of commercial fishing vessels and their crews amounted to a value of $114,018,-151.00 for the states of Oregon, Washington and California, and $39,299,005.00 for Alaska, or a grand total of $153,317,156.00 for the Pacific fishing area.[1]

During the same year 30,084 persons were employed in the three states as commercial fishermen and 12,800 in Alaskan waters, a grand total of 42,884. These persons manned in the three states 2,858 fishing vessels of more than five tons registry and in Alaska 1,601 such vessels, for a total of 4,459; and in the three states 7,081 vessels of five tons or under, and in Alaska 3,473, or a total of 10,554 of the smaller boats. Thus a grand total of 15,013 fishing boats was engaged in the industry during the year.[1]

Approximately 75% of the fishermen are represented by the Fishermen's Union, through its locals in various sections of the Pacific Coastal fishing area. The balance are represented by local unions of the American Federation of Labor. All of them fish on a share or "lay" basis.

From these figures it is apparent that the Fshermen's Union is directly and immediately concerned with the

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[1]Figures from Fish and Wild Life Service, United States Department of Interior, Commercial Fisheries Branch.

issues in the present action. As members of the crews of commercial fishing vessels its membership is constantly exposed to the hazards of the industry and to the grave risks inherent in a life devoted to wresting the fruits of the sea.

Statistics of the number and rate of maritime accidents affecting commercial fishermen are not now available to the Union. This Court can take judicial notice of the fact, however, that such accidents, directly affecting and in some instances destroying the livelihood of fishermen employed on a lay or share basis, do occur with a frequency dependent upon weather conditions, navigational skill, and other variable factors. The trial court held that fishermen suffering such loss may recover from the owner of a vessel whose negligence is found to be a proximate cause of the loss. The Court of Appeals below reversed, holding that such fishermen have no cause of action for their loss. It is manifest that every member of the Fishermen's Union and, indeed, every commercial fisherman, has a direct and compelling interest in the outcome of this action and in persuading this Court to consider the decisions below upon their merits.

Thus the importance of the questions involved here goes far beyond the interests of the parties in this case. Fishermen on every coast and in every port of the United States are and will be affected by this decision. Indeed, at the present time there are pending in the United States District Court for the Southern District of California two cases involving identical issues of

law: *Carbone, et al. v. The Fishing Boat "Del Rio," etc., et al.,* No. 10680, and *Mandich, et al. v. Tugboat R. D. Alexander, etc., et al.,* No. 12709. There is reason to believe that many similar causes of action are disposed of by settlement.

The decision of the Court of Appeals below is, as the petition for writ of certiorari contends, irreconcilable with its decision in *Van Camp Seafood Co. v. DiLeva,* 171 F. 2d 454. By the same token it simply ignores an earlier decision of the Circuit, *United States v. Laflin* (1928), 24 F. 2d 683, and the cases cited and discussed in that opinion. In that case the Court held that in the Act of June 7, 1924, 43 Stat. 595, the Congress had in effect recognized the existence of a cause of action on the part of the crew of a vessel disabled by the negligence of another vessel. It is no matter that the action was held to belong to the employers of the crew as trustees on their behalf. The important conclusion from the case is that the crew have an interest secured by the law. It is this proposition which the Ninth Circuit has now repudiated on the strength of a decision of this Court (*Robins Dry Dock and Repair Co. v. Flint,* 275 U. S. 303) which by no means requires the result.

Conclusion.

The livelihood of thousands of fishermen and those dependent upon them hinges upon the action of this Court in the present case. This decision will determine definitively whether they have any protection against the unavoidable risks of the sea or whether in signing the articles they sign away their means of living. The law has long watched over the affairs of seamen with special solicitude. It is unthinkable that in this enlightened day it should now turn its back upon a group of maritime workers whose contribution to the nation's economy is of such importance.

As representatives of working fishermen we submit that this Court should hear and determine the present action on its merits, and that for all of the foregoing reasons the petition for writ of certiorari heretofore filed herein should be granted.

Respectfully submitted,

MARGOLIS & MCTERNAN,

By JOHN W. PORTER,

Attorneys for Fishermen and Allied Workers Division, International Longshoremen's and Warehousemen's Union.

December 4, 1951.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 417

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Petitioners,

vs.

JACK BORCICH, ANDREW VILICICH and BORTOL ZANKICH, Co-Owners of the Oil Screw Marsha Ann,

Respondents.

PETITION FOR REHEARING

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Respondents.

PETITION FOR REHEARING

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The Petitioners request a rehearing of the Petition for Certiorari in the above entitled cause for the following reasons:

1. The opinion of the Ninth Circuit Court is ambiguous and indefinite as to the law upon the subject of liability of tort feasor for damages to third parties. Since the decision of the Court of Appeals below in this case, 191 F. 2d 392, the writer has been approached by many counsel, both those representing Underwriters and claimants, expressing the necessity of the Supreme Court to clarify the most indefinite

decision of the Court of Appeals in this matter. A thorough reading of the decision below reveals the lack of clarity as to whether there is a cause of action if the suit were instituted by owners. It is of the greatest importance that the Court below allowed an owner to recover as damages, a share or lay of the prospective catch during the period the "Bear" was laid-up for repairs. He recovered as a member of the crew, yet the other members of the crew who sued in their own names, and not through the owners, were held to have no cause of action. It is far from clear as to the basis of this recovery. If this owner recovered under his contract as a member of the crew, then, why did the Court of Appeals below state "If this case presented only a question of capacity of parties to sue it would not be difficult (in light of the liberal rules of pleading and our decision in Van Camp Sea Food Inc., vs. Di Leva et al, 171 F. 2d 454) to sustain the decision of the trial court. However, the problem we confront is whether the fishermen have suffered a legal injury as the result of appellants' negligence." The Court then permitted one member of the crew to recover, and denied recovery to the remaining members.

This court has an obligation, as was stated on September 7, 1949, by Chief Justice Vinson, in an address before the American Bar Association: "The debates in the Constitutional Convention make it clear that the purpose of the establishment of one supreme national tribunal was, in the

words of John Rutledge of South Carolina, 'to secure the national rights and uniformity of judgments.'"

The decision of the Court of Appeals below in this case is conflicting in itself. Seamen, shipowners and their underwriters, have the right to have our Supreme Court clarify the matter of the extent of the liability in cases such as are here presented. Certainly the Courts below should not have to again decide a case instituted by the owners in behalf of the other crew members who did not recover in this action, IF this Court is of the opinion that no such cause of action exists.

At the present time there are two cases pending in the United States District Court, Southern District of California, Central Division, wherein the liability of the tort feasor vessel to fishermen for their share of the prospective catch, is involved, Mandich et al vs. Tugboat "E. D. Alexander," etc., et al, being No. 12709-HW, and Carbone et al vs. The Fishing Boat "Del Rio", etc., being No. 10680-C. The latter case has recently been decided against the libelant fishermen. The writer was just advised that there is another such case in this District, the name of which I do not have, and another in Florida involving a collision between a fishing vessel and another ship not of the fishing fleet. Much litigation will be necessary if this Court does not clarify the decision of the Court of Appeals below in this case.

This Court should clarify the decision of the Appellate

Court below by distinguishing Van Camp Sea Food Inc. vs. DiLeva 171 F. 2d 454, or by disapproving the same, if not affirming the District Court in this case. We cannot too strongly urge the Court to diligently read and analyze the opinion of the trial court at 92 Fed. Supp. 929, and compare it with the opinion of the Court of Appeals at 191 F. 2d, 392, particularly directing the Court's attention to page 396 - commencing with "We next consider the damages awarded to nine crew members --", to the end of the opinion.

2. Justice Story, in Harden v. Gordon, 11 Fed. Case 480 at 485, said "Every Court should watch with jealousy an encroachment upon the rights of seamen, because they are unprotected and need counsel;" - - "But courts of maritime law have been in the constant habit of extending towards them a peculiar, protecting favor and guardianship. They are emphatically the wards of the admiralty; - - ." How, then, in the name of equity or justice, can it be said that the permitting of a tort feasor to damage a seaman by taking from him his employment without being financially responsible at the bar of admiralty, that this Court is "watching with jealousy an encroachment upon the rights of seamen"? The sustaining of the Court of Appeals in this case is a flagrant breach of the obligation of Admiralty and an opening wedge in the complete disregard of the rights of seamen, as well as being diametrically opposed to the position this Court has always heretofore taken.

For the foregoing reasons, it is respectfully requested

that a rehearing of the Petition for Writ of Certiorari in this matter be granted, and that this Honorable Court grant Certiorari herein.

Respectfully submitted,

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